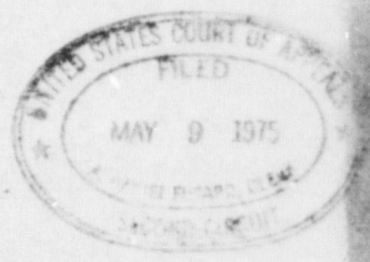
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



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FRANCIS X. CALO Plaintiff-Appellant vs. R. MORRIS PAINE, et al Defendants-Appellees	:	On Appeal from the United States District Court for the District of Connecticut, from Trial Judgment

APPELLEES' BRIEF

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TEXT

Wright & Miller, Federal Practice and Procedure; Civil

ISSUES PRESENTED FOR REVIEW

(1) Did the District Court err in granting Defendants' Motion to Dismiss the Complaint by the Court's utilization of the Summary Judgment procedures of Fed. R. Civ. P. 56?

(2) Did the Court err in concluding that the Plaintiff's allegations concerning his discharge from public employment, coupled with the undisputed facts did not state a cause of action (under 42 U.S.C. Sec. 1983) either in the Plaintiff's allegations concerning:

(a) The claimed deprivation of his property rights or his liberty rights in, and to, his former position of Executive Director of the Waterbury Parking Authority? or

(b) The claimed political conspiracy to deprive him of such position?

STATEMENT OF THE CASE

This action was commenced by plaintiff in the Federal District Court for the District of Connecticut in September,1974, by a complaint citing the then members of the Waterbury Parking Authority, members of the Civil Service Commission, the Acting Director of Personnel, and the Mayor of Waterbury for alleged deprivation of plaintiff's liberty and property rights under 42 U.S.C. 1983, and a conspiracy by the defendants to deprive him of same. App. p. 1-16.

Plaintiff asked, among other things, for a temporary injunction reinstating plaintiff to his former position and enjoining defendants from dismissing him for same without due process of law. App. p.1-16.

Hearing was held on the temporary injunction on September 18,1974. At the hearing a stipulation was entered into between plaintiff and defendant, Civil Service Commission, with respect to the truth of certain paragraphs of plaintiff's complaint. App. p.43-44, and between plaintiff and all derendants as to the truth of the statements, with certain reservations, made by defendants, R. Morris Paine and Raymond Giannamore, App. p.92,93,95-104. submitted with a Motion to Dismiss filed by all the defendants that day. App. p.94.

Subsequent to the hearing the District Court, M.Joseph Blumenfeld,J., on the 27th of November, 1974, issued a Memorandum of Decision on defendants' Motion to Dismiss in which it treated that motion as one for summary judgment and granted same.

Plaintiff has appealed.

JURISDICTION

Jurisdiction is alleged under 28 U.S.C.1331 (a), App.p.3.

"Sec.1331. Federal question; amount in controversy: costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

and under 28 U.S.C.1343 (3) (4), App. p. 3.

"Sec.1343.Civil rights and elective franchise.

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights,including the right to vote. June 25,1948, c.646,62 Stat.932;Sept.3,1954, c.1263,Sec.42,68 Stat.1241;Sept.1241; Sept.9,1[illegible]7, Pub.L.85-315,Part III,Sec.121,71 Stat.637."

FACTS

Francis X. Calo, Plaintiff-Appellant in this matter in the Fall of 1973 was a member of the Board of Tax Review of the City of Waterbury. In addition, at that time, plaintiff ran on a Democratic primary slate for the office of Comptroller in opposition to the slate headed by the then Mayor, and current Mayor, of the City of Waterbury, a defendant in this action, Victor Mambruno. App.p. 8.

Also, at that time, plaintiff took a competitive civil service examination for the position of Executive Director of The Waterbury Parking Authority, App. p.5. He placed second in that examination, Plaintiff's Brief,p.13, and when the first candidate withdrew from consideration plaintiff on March 6, 1974, was certified as the then highest ranking candidate on the list by the Acting Personnel Director. Defendant, Albert Provost, and was appointed by the Parking Authority, commencing work on March 11, 1974. App. p.5. This was the beginning of his probationary period as outlined in Chapter IX of the Civil Service Rules and Regulations. Plaintiff's Brief,Attachment #1.

Between March 11, 1974, and July 5, 1974, Plaintiff met with the defendant Parking Authority Commissioners (Paine, Barton, Giannamore, Jannitto, and Ubaldi) on various occasions, and reviewed incidents involving his conduct and performance as Executive Director; the total number of incidents and occasions of meeting being in dispute. These meetings were private and informal. During one of these meetings in June, 1974, plaintiff was asked to resign. At the next meeting, two weeks later, he was told that if he didn't resign he would be fired. When plaintiff refused to resign the Parking Authority gave notice of a formal meeting, held such a meeting on July 5, 1974, and discharged

him subject to approval by the Acting Personnel Director, Record, Doc. #17, App.p.92,93, 95-104. Such approval was given later that same day, App. p.19. He was paid through July 19, 1974, and has not been paid since. App. p.8.

At the July 5th meeting plaintiff was present and his attorney was present, although the attorney came into the meeting late and after the action of dismissal had been taken. App. p.52. At the two informal meetings with plaintiff, next prior to the meeting of July 5, 1974, he was also accompanied by his attorney, App. p. 48.

At the July 5th meeting both Mr. Calo and his attorney requested that the charges be made public. App.p.53,54. Plaintiff subsequently requested a hearing before the Civil Service Commission which was not afforded him. App. p.8.

ARGUMENT

A

THE DISTRICT COURT DID NOT ERR IN TREATING DEFENDANTS' MOTION TO DISMISS AS A RULE 12(b) (6) MOTION, WHICH IN TURN, IT PROPERLY TREATED AS A MOTION FOR SUMMARY JUDGMENT UNDER RULE 56.

Unfortunately, Defendants' Motion to Dismiss the Complaint was inartfully labeled and the substance of same was verbalized in a rather cumbersome fashion. Instead of labeling the Motion as a "Motion To Dismiss the Complaint Under R. 12(b) (6)" the Defendants utilized the simple designation "Motion of Defendants to Dismiss Complaint." (App.p.41). In addition, instead of the precise language of R. 12(b) (6) (".....failure to state a claim upon which relief can be granted,.....") the Defendants utilized the concededly ambiguous and cumbersome phraseology of ".....the complaint does not state a substantial federal question." (App.p.41). However, as Professor Wright points out the denomination of such a motion is irrelevant. "Although the conversion provision in Rule 12 (b) expressly applies only to the defense described in Rule 12(b) (6), it is not necessary that the moving party actually label his motion as one under that provision in order for it to be converted into a motion for summary judgment. The element that triggers the conversion is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material. It is not relevant how the defense actually is denominated." Wright & Miller, Federal Practice and Procedure; Civil, Sec. 1366, p. 676.

Among the cases cited by Professor Wright in support of the quoted statement is O'Neil vs. Maytag, 1964, U.S.C.A., Second Circuit, 339 F.2d 764, in which case Chief Judge Lumbard sustained Judge McLean's treatment of a Motion to Dismiss for lack of subject matter jurisdiction as a Motion to Dismiss for failure to state a claim. Judge McLean in 230 F. Supp. p. 240 noted that eminent New York City 'counsels' labelling of their motion was "a mere play on words" and treated the Motion to Dismiss as a Motion for Summary Judgment.

In the instant case, Judge Blumenfeld had before him the Plaintiff's verified complaint with its 16 attached exhibits (App. pp. 1 through 33), the affidavits of Mayor Mambruno (App.p.34); of Personnel Director Provost (App.p.37); of Parking Authority Chairman Paine (App.p.45); of Parking Authority Commissioner Giannamore (App.p.58); together with the Partial Stipulation of Facts for Hearing On Motion for Preliminary Injunction (App.p.43)- with the latter's reference to the undisputed provisions of the Waterbury Civil Service Rules and Regulations (Appendix A of Appellant's Brief). With this mass of documentary evidence spread before him, Judge Blumenfeld concluded that the Defendants had inartfully labelled a Motion, which, in fact, was a Rule 12(b) (6) Motion,which he treated as a Motion for Summary Judgment under R. 56. The treatment and conclusions of Judge Blumenfeld were correct.

"The last sentence of Rule 12(b) provides that a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to be converted into a motion for summary Judgment whenever matters outside the pleading are presented to and accepted by the Court." (Wright & Miller, op.cit.Sec. 1356,p.675)

Here the said Partial Stipulation of Facts for Hearing on Motion for Preliminary Injunction and the said Waterbury Civil Service Rules and Regulations constitute those matters for conversion purposes, which are "outside the pleading."

Again, Professor Wright's Treatrise illuminates the issue and gives support to Judge Blumenfeld's "conversion procedure." "As a practical matter, a dismissal under Rule 12(b) (6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. In other words, dismissal is justified only when the allegations of the complaint itself demonstrate that plaintiff does not have a claim. For example, in Case vs. State Farm Mutual Automobile Insurance Company" (1961, 294 F.2d 676) "plaintiff claimed damages for defendant's wrongful termination of a contract. However, the terms of the contract, which was attached to the complaint as an exhibit, showed that the defendant had the right to terminate the agreement with or without cause. Since it was clear that the plaintiff had not stated an actionable claim, the court dismissed the complaint under Rule 12(b) (6)....." (Wright & Miller, op.cit. Sec. 1357, pp. 604-605).

The Defendants submit that the quoted language from Professor Wright, with its utilization of the Case case, as an example is on all fours with the instant situation. In Case it appears that a contract was attached to the complaint as an exhibit which showed that the defendant had the right to terminate the agreement with or without cause. In the instant case, the verified complaint, together with the undisputed Waterbury Civil Service Rules and Regulations,

clearly showed, on their face that per the provisions of the Waterbury Civil Service Rules and Regulations, any probationary employee may be dismissed "at any time during the probationary period." (Cf.Chapter IX, Sec. 5 of the Waterbury Civil Service Rules and Regulations - Appendix A to Appellant's Brief). And, paragraph 20 of Plaintiff's complaint clearly indicates and admits, that Mr. Calo was a probationary employee during the first six months period of any service to the City as the Executive Director to The Waterbury Parking Authority. (Cf.App.p.5 and paragraph 3 of the Partial Stipulation of Facts For Hearing on Motion for Preliminary Injunction, App. p.43).

In other words, the complaint and the exhibits constantly allude to Mr. Calo's claimed rights as a probationary employee. These rights had their genesis under the Waterbury Civil Service Rules and Regulations. What the contract was to Case, supra (with its right to terminate with or without cause), the Civil Service Rules are to this case.

Judge Blumenfeld constantly and properly took judicial notice of the Civil Service Rules and Regulations. Chapter IX, Sec. 1,states:

> "Section 1- Objective- The probationary period shall be regarded as an integral part of the examination process and shall be utilized for closely observing the employee's work,for securing the most effective adjustment of a new or promoted employee to his position and for rejecting any employee whose performance is not satisfactory."

And Section 5 (a) of that Chapter states:

> "At any time during the probationary period,a department head, with the approval of the Director of Personnel, may remove an employee if, in his opinion,the working test period indicates

that such employee is unable or unwilling to perform the duties of the position satisfactorily....." (emphasis added). (Cf. pp. 22-23 of Appendix A attached to Appellant's Brief).

It is, of course, fundamental that the test which this Honorable Court must apply in reviewing the propriety of the judgment entered in favor of the Defendants here is the same test which the District Court applied: namely, whether there was compliance with Rule 56(c) (Wright & Miller, op. cit. Sec. 2716). Or, as the Supreme Court has stated: "..... rule 56(C).....authorizes Summary Judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,.....(and where) no genuine issue remains for trial...(for) the purpose of the rule is not to cut litigants off from the right to trial by jury if they really have issues to try." Sartor vs. Arkansas Natural Gas Corp, 320 U.S. 620, 627....."; Poller vs. Columbia Broadcasting System, Inc., 1962, 368 U.S. 464, 82 S.Ct. 486, 7 L. Ed. 2d 458, 461.

Bearing in mind the quoted language of the Waterbury Civil Service Rules and Regulations and the Poller test, it is manifest that Judge Blumenfeld's treatment of Defendants' Motion to Dismiss as an inartful Rule 12(b) (6) Motion which, in turn, he converted into a Rule 56 Motion was a proper conclusion on the basis of the verified complaint, documents and data which were presented to the Judge. Granted, the question remains, as to whether or not the evidence before the Judge, including the complaint, set forth a cause of action which indicated constitutionally impermissible conduct on the part of the Defendants. However, as will be discussed

in the later sections of this Brief, the law is clear (including especially the law of this Circuit) that the complaint's allegations, in light of the agreed factual background, do not constitute a claim for relief under 42 U.S.C. Sec. 1983. Prior to discussing the constitutional questions, Appellees wish to make one further observation.

The instant Motion of the Defendants to Dismiss the Complaint was filed on the same day, and during the course of the hearing conducted by Judge Blumenfeld on Plaintiff's Motion for Temporary Injunction (App. p.94). Any averment that this procedure was not in accord with the "10 day rule" of Rule 56 (c) is not correct. Sarelas vs. Porikos, 1963, U.S.C.A., 7 Circuit Court, 320 F.2d 827. In Sarelas Judge Kiley stated "There was no genuine issue of fact before the District Court upon the Circuit Court(of Cook County, Illinois) Finding and Judgment,--------Thus a question of law only was presented to the District Court and the record shows the question was extensively briefed by the plaintiff.-------The judgment entered was based upon the motion filed, and the exhaustive brief, and we see no denial of hearing, or arbitrary action, under the circumstances ....." (320 F. 2d at page 828).

In the instant matter, Appellant's "exhaustive Brief" which has been filed in this Court is matched only by his more exhaustive briefs which were presented to Judge Blumenfeld. Cf. Doc. #6, Index to Record on Appeal, Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction and Doc #[illegible], Index to Record on Appeal, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

The instant situation is not analagous to the situation faced by the Fourth Circuit in Johnson vs. RCA Corporation, 1974, 491, F.2d, 511; in Johnson, the Fourth Circuit, through Judge Donald Russell, reversed because the "District Court did not.....provide by appropriate order 'reasonable opportunity' for plaintiff to file any 'material made pertinent to such a motion by Rule 56'. The plaintiff should have been afforded an opportunity....." (491 F.2d, 514). In this situation the plaintiff was afforded more than a reasonable opportunity. (Cf.said Doc. #19, Index to Record on Appeal, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

In short, the Appellees assert the District Court committed no error in granting their Motion to Dismiss the Complaint and that the District Court's utilization of the Summary Judgment procedures of Rule 56 was proper.

As to the constitutional issues raised by the complaint, the Appellees will now address themselves to those issues.

B

PROPERTY INTEREST

THERE WAS NOTHING IN THE COMPLAINT, STIPULATED AND AGREED FACTS, OR NO ADDITIONAL EVIDENCE RECEIVED WHICH COULD ESTABLISH A "PROPERTY" INTEREST IN PLAINTIFF'S CONTINUED EMPLOYMENT ENTITLING HIM TO A PRE-TERMINATION HEARING, WHICH FOR PURPOSES OF THIS MOTION, THE DISTRICT COURT ASSUMED PLAINTIFF DID NOT RECEIVE. THE CONTROLLING LAW ON THIS SUBJECT IS CONTAINED IN BOARD OF REGENTS OF STATE COLLEGES v. ROTH, 408 U.S. 564 (1972), AND PERRY v. SINDERMANN, 408 U.S. 593 (1972).

In Roth the court held that "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." supra at 577.

In Perry the court stated that in addition to a formal tenure contract such claim of entitlement could be based on "rules or mutually explicit understandings that support his claim .....", supra at 601, emphasis added. No formal tenure contract or mutual understanding is claimed by plaintiff. He claims that his understanding was that the probationary period locked him into the job for six months, the full probationary period. In fact, the explicit language of the Civil Service Rules and Regulations, Plaintiff's Brief, Attachment #1, contains the following language in Chapter IX, "Probationary Period".

Section 1. Objective.

The probationary period shall be regarded as an integral

part of the examination process and shall be utilized for closely observing the employee's work, for securing the most effective adjustment of a new or promoted employee to his position and for rejecting any employee whose performance is not satisfactory.

Section 2. Duration.

The Amendment provides for a period of probation not to exceed six months before an appointment may be made permanent, and during which period a probationer may with the consent of the Director of Personnel be discharged,reduced in class or rank, or be replaced on the eligible list.

.....

Section 3. Promotional Appointments.

.....If a person is removed during his probationary period following a promotion, he shall be entitled to re-employment rights in his former class.

Section 5. Dismissal During Probationary Period.

(a) At any time during the Probationary period, a department head, with the approval of the Director of Personnel, may remove an employee if in his opinion the working test period indicates that such employee is unable or unwilling to perform the duties of the position satisfactorily or that his habits and lack of dependability do not merit his continuance with the service. Upon such removal, a report in writing shall be sent to the Director of Personnel and to the employee listing the reasons for the removal.

(c) If, however, an employee is dismissed because of his

failure to adjust properly to his job, he shall be given fourteen calendar days advance notice.....

All of the above make it clear that the controlling law, the Civil Service Regulations explicitly nullify the possibility of claim that there could be any mutually explicit understanding. It is explicit, from the City's side, that the probationary period was an integral part of the examination process, that he was to be closely observed during that period, and that at any time during such period he could be dismissed if the department head, with the approval of the Director of Personnel, did not feel he was adjusting to his job. As Judge Blumenfeld noted in his Memorandum of Decision, p. 11, "The joint discretion given to the department head and the Director of Personnel was clearly intended to be unfettered."

It should be noted that Exhibit J, attached to plaintiff's complaint, App. p. 27, makes it clear that the public was fully cognizant of the lack of any property interest of a probationary employee. The editorial in the Waterbury American, July 9, 1974, reads in part "Fortunately, probationary periods are part of the civil service system. They provide a relatively painless way of separating a new worker from a job for which he is unsuited."

Based on all of the foregoing, the District Court could reach no other conclusion than that plaintiff had no "property" interest in continued employment entitling him to a pre-termination hearing.

C

LIBERTY INTEREST

THERE WAS NOTHING IN THE COMPLAINT, STIPULATED AND AGREED FACTS, OR NO ADDITIONAL EVIDENCE RECEIVED WHICH COULD ESTABLISH A "LIBERTY" INTEREST IN PLAINTIFF'S CONTINUED EMPLOYMENT, THUS REQUIRING A PRE-TERMINATION HEARING, WHICH FOR PURPOSES OF THIS MOTION THE DISTRICT COURT ASSUMED PLAINTIFF DID NOT RECEIVE.

The total of the evidence which could be before the court on this matter was the letter of the Waterbury Parking Authority,dated July 5, 1974, addressed to the Director of Personnel,App.p.19, the letter of the Waterbury Parking Authority dated July 5,1974,addressed to the Director of Personnel, with a copy to plaintiff,App. p.17,18, the newspaper items contained in App. p.20-33,and the fact that the 2nd letter above, App. p.17,18 was placed in plaintiff's personnel file. Memorandum of Decision on Defendants' Motion to Dismiss, App. p. 78.

The first of these letters, App. p. 19,merely transmits the basics required by the first sentence of Ch.IX Sec. 5(a) of the regulations in its statement that plaintiff; "is unable to perform the duties of the position satisfactorily and that his habits do not merit his continuance with the service."

The second letter, App. p.17,18, was required by the last sentence of Sec. 5(a). Its release to the public was the result of the request of the plaintiff" ..... repeatedly asking that "charges" be made public .... " at the meeting of July 5,1974.App.p.53.(emphasis added.) His attorney backed up this request. " Attorney Krug

protested that there had been no claims or charges made public against Mr. Calo "until now". App. p. 53 (emphasis added.)

Following a conference with his attorney the request was again pursued. "Mr. Calo demanded he be given "all the facts and names" and his Attorney, Fred Krug, added that his client had no idea what the charges were and feels that everything should be made public and that there can be no valid criticism of what he is doing."App. p. 54 (emphasis added.)

The newspaper articles cited by plaintiff do not contain any remarks by any of the defendants with respect to plaintiff other than the articles on the day following the dismissal of July 5, 1974. App. p. 22,23. Even these indicate that the letter -(App. p.17,18) was made public only after Calo conferred with his attorney, Fred W. Krug, and because plaintiff felt they should be made public. The articles prior to July 5 were typical "no comment" types, and the articles following July 6, 1974, were almost universally indicated to arise from comments of plaintiff and never from defendants.

Again we must turn to Roth , supra, to determine what "liberty" is guaranteed by the 14th Amendment. Quoting from Meyer v. Nebraska, 262 U.S. 390, 399, the Roth court states at p. 572:

"While this Court has not attempted to define with exactness the liberty ------ guaranteed (by the Fourteenth Amendment) the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship

God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized -------- as essential to the orderly pursuit of happiness by free man."

In testing "liberty" for employment purposes the Roth court required a "charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would have been a different case. For "(w) here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Roth, supra at 573,(emphasis added.)

Again, in Roth,the court said "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example did not invoke any regulations to bar the respondent from all other public employment in state universities." Roth, supra at 573,(emphasis added.)

Citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895-896, the Roth court states - "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. Roth , supra at 575.

The test to be applied then is to determine whether the letter of July 5, 1974, App. p. 17,18, made public at the insistence of plaintiff, App. 22, 23, 53, 54, which was published in the newspaper on July 6,1975, App.p.22,23, and placed in plaintiff's personal file was such as would

seriously damage his standing and associations in the community, or imposed on him a stigma or other disability which foreclosed his freedom to take advantage of other employment opportunities.

Plaintiff admits that the report was required under Civil Service Regulations, Plaintiff's Brief,p. 43. Plaintiff attempts now to twist his requests, and his attorney's requests that the charges be made "public" into one that they be placed on the "record". The minutes of the July 5th meeting. App. p. 53, 54, and the newspaper accounts the following day, App.p. 22, 23 put this attempt to rest.

> "He (Calo) feels it should be made public ------ He and anyone else would be able to rebut them if they are made public" Krug said. App. p. 22.
>
> "Calo interrupted at this point to demand that names and charges be put on the table.
>
> When Paine tried to sum up the history that led to the action, Calo again interrupted. "I don't want to hear any history. I want to hear specific charges and persons making charges", he said ----------.
>
> "It is an open meeting. I want the names here and now in front this man (the press)." App. p. 23,

Plaintiff also now claims that he was refused these "charges" before, yet he took no exception at the preliminary injunction hearing to that portion of defendant Paine's affidavit which covered this. App.p.92, 98-105.

> "Plaintiff indicated that he had not been informed of the charges against him. As Chairman I indicated that he had been informed but we would be happy to review them with him again and began to review the incidents which we specifically reviewed with him at

the previous reviewing evaluation meetings, all prior to or on June 13, 1974. Attorney Legaro stopped this process indicating that he did not want to go into details. App. p. 48 (Emphasis added.) His only comment on this for exception purpose is contained on App. p. 101.

The District Court could therefore have reached no other conclusion than that such dissemination as there was of the charges was solely caused by plaintiff's demands.

Because of that the District Court determined that plaintiff's "reputational" interest has not been adversely affected by any action taken by the defendants, "Plaintiff cannot himself cause uncomplimentary statements to be publicized and then rely upon such publication to establish an injury to his reputation." Memorandum of Decision on Defendant's Motion to Dismiss, App. p. 77.

In spite of this determination by the District Court it did acknowledge that "the cases seem to suggest that the same kinds of statements that would injure an employee's reputation in the community would also impose a stigma foreclosing future employment opportunities. See e.g. Lombard v.Board of Education of the City of New York,No.73-2057 (2d Cir. July 22, 1974); Russell v. Hodges, supra."App. p.83. Lombard at 502 F 2d 631 (1974) The test applied by the District Court therefore covered both the "reputational" and "employability" aspects of the charges.

In applying the test of the Roth case the District Court took the view that a review of the lower courts' decisions indicates they have almost universally refused to consider the actual impact which charges have had or might have on an employee's ability to obtain future employment and have instead looked at the charges to determine their stigma

or lack thereof, per se. The cases cited indicate this; a doctor - prescribing large and unusual amounts of drugs coupled with charge of serious irregularities in the past, Suarez, stigma; teacher who was anti-establishment. Lipp, no stigma; policeman - sleeping on duty, absent from his post and wearing improper attire, Russell, no stigma; teacher - inadequate attention to certain students, hostility to colleagues, indifference to rules and regulations, and failure to evidence potential for professional growth. Berry no stigma; teacher - failing to meet certain required standards. Hajduk, no stigma; Social Security employee failure to meet standards of professional conduct. Sayah, no stigma; Customs Service employee absence without leave. Heaphy, no stigma; policeman shooting a police car, treatment of accused, shooting out windows, lack of judgment, disobeying orders. Abeyha, no stigma; Teacher, alleging only that she has sought employment elsewhere but has been unable to obtain it, Perkins, no stigma. App. p. 81.

Plaintiff cites many cases in his brief, Plaintiff's Brief page 37, which he feels represents "gross incompetence or highly offensive personality defects" which Plaintiff asserts broaden the rule which the District Court followed. A review of these cases does not indicate that any of these were charges in any way similar to those in the present case. Hostrop was a case of lying, Hunter was a 1971 case prior to the Supreme Court Roth decision; in Carpenter the court at page 227 characterized the charges as "cruelty or emotional instability." in Ford the charge was "misrepresentation", another word for lying, in Buggs, gross misconduct, in Simmonds it was a "wrongful claim for four days pay," in the Hirsch case the rehearing was granted

on a freedom of speech claim not a stigma issue, and Newcomer predated Roth.

Thus, the cases cited by the District Court and those cited by the Plaintiff in his brief which postdate Roth, would seem to agree with the District Court interpretation of Roth and its successors.

Two points should be made on this issue which were clearly pointed out by the District Court in its Memorandum of Decision on Defendant's Motion to Dismiss, App. p. 82. The first is that if a subjective approach is taken on Plaintiff's ability to obtain reemployment there would be no possibility of ever determining in advance of dismissal whether a due process hearing would subsequently be required. As the District Court so well put it "considering such evidence could lead to the anomalous result of a constitutionally permissible discharge becoming progressively unconstitutional as the employee encountered difficulties in his search for a new job." App. p. 82

The second is that " a general rule that informing an employee of job-related reasons for termination created a right to a hearing, in circumstances where there was no constitutional requirement for the state to do anything, would be, self- defeating the state would merely opt to give no reasons and the employee would lose the benefit of knowing what might profit him in the future." Russell v. Hodges, 470 F.2d 212 (217)

The District Court then pursued Russell v. Hodges to obtain an "appropriate definition of stigma and indicated a dismissal statement is stigmatizing if it charges an employee with immorality, dishonesty or some serious personality defect or socially condemmed status which is beyond the power of the individual to change. App. p. 85 Nothing in the letter of July 5 could be characterized by those terms.

The District Court correctly concluded that the reasons for discharge

contained in Defendant Parking Authority Commissioner's letter of July 5, 1974, were not such as would seriously damage his standing and associations in his community nor did they impose a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

D

THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT A SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS SHOULD ENTER DESPITE PLAINTIFF'S ALLEGATIONS CONCERNING A POLITICAL CONSPIRACY TO DEPRIVE HIM OF HIS POSITION AS EXECUTIVE DIRECTOR OF WATERBURY PARKING AUTHORITY.

Appellant, in his Brief, labors hard and long in his attempt to persuade this court that this court's decision in Alomar v. Dwyer, 1971, 447 F.2d 482, is no longer "good law." In addition, Appellant argues that, in any event, Judge Blumenfeld incorrectly applied the Alomar rule to the instant case, which involved a non-patronage appointee to a civil service position (i.e., the position of the Executive Director of The Waterbury Parking Authority is a member of the classified service under the Waterbury Civil Service Rules and Regulations). In fact, Appellant becomes so exorcised that he laments: "Indeed, the District Court's extension of Alomar to probationary civil service employees would undermine the civil service and come close to a judicial reversal of its goals....." (page 13 of Appellant's Brief).

Appellees feel confident that the District Court decision undermined nothing. In fact, the decision supported the civil service goals, and procedures, in Waterbury inasmuch as the decision confirmed this Court's distinction that civil service probationary employees are in a different caste, or different mold, when contrasted with civil service employees who have completed

successfully their probationary period. Cf. Russell v. Hodges, 1972, 470 F.2d 212. In fact, a contrary holding by the District Court would in fact amount to a judicial intrusion into the operation and functioning of the civil service system. That such would be the case was recognized by the U. S. District Court for the Southern District of Indiana in Indiana State Employees Association, Inc. vs. Negley, 1973, 365 F.Supp. 225. In that case, Judge Noland stated: "The court is aware of the limitation of the patronage system as a means of selecting public employees. It must conclude however, that a judicial decision aimed at abolishing this system, to the extent that it may still exist in the State of Indiana, would invade the functions of the State legislative and executive branches without serving the cause of improved state government." (Emphasis added.) (365 F.Supp. at P. 235)

The Appellant (and perhaps the concurring Judge, Judge Campbell,(1) in Illinois State Employees Union Council 39 vs. Lewis, 7th Circuit, 1972, 473 F.2d 561) is concerned that Alomar is no longer good law because it was decided approximately a year prior to the decision in the Roth-Sindermann Duo,(2) and Certiorari

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(1) At page 577 of 473 F.2d, Judge Campbell noted the time span and added: "Too, discussion or even citation of Alomar.....was conspicuously omitted from the Sindermann opinion....."

(2) Board of Regents of State Colleges vs. Roth, 1972, 408 U.S. 564, 33 L.Ed. 2d 548; Perry vs. Sindermann, 1972, 408 U.S. 593, 33 L.Ed. 2d 570.

of Alomar was denied by the Supreme Court approximately six months prior to the Supreme Court's decision in Roth-Sindermann.

Appellant (along with Judge Campbell) places much significance in the fact that, in Roth-Sindermann, there is no mention of Alomar in either of the majority opinions by Justice Stewart, or in the concurring opinions of the Chief Justice, or in the dissents of Justices Brennan, Marshall, and Douglas (which opinions occupy practically 34 pages in the 33 L.Ed. 2d Volume), or in any of the footnotes to these opinions. However, bearing in mind that the Dynamic Duo of Roth-Sindermann was decided subsequent to Alomar and the Supreme Court's laconic denial of certiorari,(3) the Appellees assert that this omission of any discussion or mention of Alomar in the Roth-Sindermann cases is supportive of their argument that Alomar remains good law for the narrow proposition for which Alomar stands. And that narrow proposition is this: "The Bailey court teaches that the sole protection for government employees who have been dismissed for political reasons must be found in Civil Service statutes or regulations." (447 F.2d at page 483)

When the United States Supreme Court was wrestling with the free speech, liberty, and property interests of university

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(3) 404 U.S. 1020, 30 L.Ed. 2d 667: "Number 71-568 - Daisy Alomar, Petitioner, v. William F. Dwyer, et al - January 10, 1972. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied."

professors(4) and with the Byzantine world of academic tenure in Roth-Sindermann, it had no occasion to address itself to the abrasive world of party politics.(5) Thus the omission of any discussion of Alomar in Roth-Sindermann is significant in that it indicates that the Supreme Court felt it had no occasion, in Roth-Sindermann, to in any way qualify or modify its non-interference with the Alomar holding. In short, if the Supreme Court had wished to spread its constitutional umbrella to/a constitutional proscription of the "spoils system," it would have been an easy and opportune occasion for it to do so in Roth-Sindermann, or at least to comment upon same. The Supreme Court's failure to do so is indicative of the fact that it sees no occasion to disturb the constitutional principle upon which Alomar rests.

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(4) Mr. Roth was an assistant professor at Wisconsin State University - Oshkosh, and the question before the Supreme Court was whether or not he had some constitutional right to renewal of his contract for a second year of teaching. Professor Sindermann had four years' experience at Odessa Junior College in Texas, and he had previous experience in academic life at other colleges and universities, extending back over almost a ten-year period. When he became embroiled in a controversy over making Odessa Junior College a four-year-college institution, the question of his non-renewal of contract was presented, on the constitutional issues, to the Supreme Court.

(5) "The new Republican broom which swept into the Rochester City Hall in the spring of 1970, cleaned Democrat Daisy Alomar out. Alomar had been working for the City since October 1967, first as a bilingual stenographer and then as an Assistant Neighborhood Service Representative and finally as a Neighborhood Services Representative at a salary of $10,426....." (47 F.2d at 482-483)

The Appellant makes much of the fact that the post-Alomar cases, which cite Alomar, for instance the Lewis case, supra, deal with patronage employees,(6) while Mr. Calo was a probationary Civil Service employee. The Appellees assert that this is a distinction, without a difference, for the purposes for which Alomar is cited by Judge Blumenfeld. Because he observed: "However, this Court is constrained by the ruling by the Second Circuit in Alomar vs. Dwyer, 477 F.2nd 482, (1971).....to hold that even assuming such a retaliatory motivation, the Plaintiff's constitutional rights were not violated by his dismissal. In Alomar the Court considered the issue whether an incoming Republican city administration could fire Democratic city employees upon their refusal to switch party affiliation. The Court held that 'the sole protection for government employees who have been dismissed for political reasons must be found in Civil Service statutes or regulations.' Id. at 483....." (Emphasis added.) (Memorandum of Decision on Defendants' Motion to Dismiss; App. page 88.)

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(6) It is true that most of these post-Alomar cases, which cite Alomar, have dealt with patronage employees. Moldawsky vs. Lindsay, 1972, U.S.D.C., S.D.N.Y., 341 F.Supp. 1393, dealt with the dismissal by Mayor Lindsay of the City Marshal; Illinois State Employees Union, Council 39 vs. Lewis, 7th Circuit, 1972, 473 F.2d 561, involved non-policy state employees (in Lewis there was a dissent by one of the three judges, Judge Kiley, and concurrence by a second judge, Judge Campbell; in fact, Judge Kiley stated, "No case decided by this Court, and none relied upon by the majority is a precise precedent for the holding of the majority that the Plaintiff's discharge for partisan political reasons were constitutionally impermissible" [473 F.2d 579]);

(Footnote continued on next page.)

Bearing in mind that the District Court was acting on a Motion to Dismiss the Complaint (cf. the discussion in Argument A of this Brief concerning the District Court's treatment of the Motion being in the nature of a Motion for Summary Judgment), the quoted language from Judge Blumenfeld's Memorandum makes it perfectly clear that the Judge was treating, as being

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(6) Continued

Nunnery vs. Barber, 4th Circuit, 1974, 503 F.2d, 1349, involved the discharge of the Manager of a State operated liquor store in West Virginia; Young vs. Coder, 1972, U.S.D.C., M.D. Penn., 346 F.Supp. 165, involved the political firing of the Assistant Superintendent of Flood Control who, the Mayor had reason to believe, was performing inadequately; Shakman vs. The Democratic Organization of Cook County, 1972, U.S.D.C., N.D. Ill., E.D., 365 F.Supp. 1241, involved an attempt by taxpayers-electors of Cook County, Illinois to bring an action in their own right, and derivately for patronage employees, to challenge the patronage system of Cook County; Indiana State Employees State Association, Inc. vs. Negley, 1973, U.S.D.C., S.D. Ind., 357 F.Supp. 38, involved an action by Indiana Department of Public Instruction employees for an injunction with respect to discharge of an employee from positions obtained through political patronage; the 357 F.Supp. 38 citation deals with a denial of a Motion for Preliminary Injunction, and the final decision in favor of the defendant is reported in 365 F.Supp. 225; and Smetanka vs. Borough of Ambridge, Penn., 1974, U.S.D.C., W.D. Penn., 378 F.Supp. 1366, involved the holding that the Borough Councilmen of Ambridge could summarily dismiss non-Civil Service and non-professional employees, such as meter maids, for failure to properly perform their duties as meter maids, and the probability that they were also dismissed for political reasons, but not solely therefor, did not require a different result.

undisputed,(7) the Plaintiff's assertion that he was discharged because of a retaliatory move made against him by the Mayor and the other Defendants because of his participation in the 1973 Democratic primary. However, even assuming that such a political vendetta existed against the Plaintiff, the District Court is saying that the Plaintiff's remedy lies within the Waterbury Civil Service rules and regulations; this is what Alomar holds, and this is still good law.

Of course, as heretofore noted, the Waterbury Civil Service Rules and Regulations are silent on this point; they provide no protection for the probationary employee at all. Chapter IX, Section 5(a) of the said Civil Service Rules and Regulations (Appendix A to Appellant's Brief) states: "At any time during the probationary period a Department Head, with the approval of the Director of Personnel, may remove an employee, if in his opinion the working test period indicates such employee is unable or unwilling to perform the duties of the position satisfactorily or that his habits and lack of dependability do not merit his continuance with the service....." (Emphasis added.)

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(7) Of course, the defendants did not concede any such thing to be the case. Cf. the Affidavits of Victor Mambruno, App. P. 34; of Albert E. Provost, App. P. 37; and of R. Morris Paine, App. P. 45.

In Footnote 6, Appellees cite Young vs. Coder, 1972, 346 F.Supp. 165, and Shakman vs. The Democratic Organization of Cook County, 1972, 356 F.Supp. 1241. The following quotes from these cases support the District Court's finding that, even assuming that there were political motives in Mr. Calo's discharge, such a fact did not afford a constitutional basis to overturn his dismissal.

".....there are two reasons why the actions of the defendant must be held to have been taken in good faith. First, the Mayor believed that the plaintiff had had an inadequate performance[8] record as Assistant Superintendent of Flood Control and was justified in discharging him.....

"Second, defendant reasonably believed that his actions were constitutional. Whatever be the sins of the "spoils system" it has to date been considered a valid exercise of discretionary authority. Alomar vs. Dwyer, 447, F. 2nd. 482....." (Young vs. Coder, supra, 346, F.Supp. at 169)

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(8) Cf. the Affidavits of the Defendants, Paine and Giannmore, concerning the inadequate performance of the Plaintiff; App. P. 45 and 58.

"We therefore hold that Shakman prohibits only political considerations which effect [sic] voter and candidate rights. The firing of Republicans by incoming Democrats and vice versa is permitted so long as retention is not conditioned on political activity or contributions.....It is this manner of political spoils system that Alomar referred to when it stated: 'The spoils system has been entrenched in American history for almost two hundred years. The devastating effect that such a system can wreak upon the orderly administration of government has been ameliorated to a large extent by the introduction of the various Civil Service laws. However, it is well understood that the victors will reap the harvest of those public positions still exempt from such laws.'.....We, therefore.....strike that portion of the prayer for relief which seeks the enjoining of all and any political considerations in public employment....." (Emphasis as in original.) (356 F.Supp. at 1248)

Applying the Young vs. Coder, and Shakman, and Alomar quotes to the instant situation, it is clear that when Judge Blumenfeld stated: ".....That a political motivated dismissal may be proscribed under city regulations does not render such a dismissal unconstitutional if it would not be in the absence of such a regulation....." (App. P. 89), he was telling the Plaintiff simply this: Even assuming your allegation concerning political retaliation is correct, your remedy is to amend the Waterbury Civil Service Rules and Regulations so that these regulations contain

specific provision against political influence on a probationary employee. Absent such a specific provision in the said Rules and Regulations, there is nothing unconstitutional about any political motivation conduct by any Defendants. That, in short, is the lesson of Alomar, and all subsequent cases, as applied to this Plaintiff.

Appellees would like to make two other brief comments concerning Appellant's arguments:

(a) There is much reliance by the Appellant on the alleged diluting effect of Illinois State Employees Union Council 39 vs. Lewis, supra, on Alomar. The Appellees' short answer to these arguments is best set forth by Judge Noland in the "first" Negley case, wherein Judge Noland noted at 357 F.Supp. at page 42, in footnote 5, that Lewis is limited to its facts and that, in Judge Noland's opinion, Alomar represents the thinking of the 7th Circuit in this particular area.

(b) Appellant makes much of an argument to the effect that the defendants could discharge plaintiff only after the completion of, and on completion of, the probationary period. In effect, Appellant is arguing that the unfettered right to discharge probationary employees, granted by the Waterbury Civil Service Rules and Regulations, can only be exercised on the 180th day (that is, on the expiration of 6 months' probationary period prescribed by Chapter IX, Section 2 of the Waterbury Civil Service Regulations).

This argument, it is submitted, means that despite the clear language of Chapter IX, Section 5(a) ("At any time during the probationary period a Department head, with the approval of the Director of Personnel, may remove an employee....."), a department head must watch a calendar and may only remove the employee at the expiration of the 180th day. If an employee is removed on the 170th day, according to the Appellant's argument, ther the department head must realize that his department budget must pay that employee for 10 more days. On the other hand, if the department head guesses wrong on his calendar notation and waits for the 181st day, then that employee is no longer a probationary employee and has all the notice, warning, hearing rights, etc., prescribed for the permanent employees in Chapters XI and XVIII of the said Waterbury Civil Service Rules and Regulations. In short, although Appellant does not challenge the right to fire a probationary employee, he says that this can only be done on the 180th day. Such an interpretation flies in the face of the quoted language from Chapter IX, Section 5(a), and, it is respectively submitted, it is absurd, on its face, from the perspective of any realistic administration of a Civil Service program.

CONCLUSION

For all of the aforementioned reasons, Defendants state that the District Court did not err in concluding that the Plaintiff's allegations and the facts did not state a cause of action under the provisions of 42 U.S.C. Sec. 1983. No cause of action was stated because Plaintiff was not deprived of his property rights or of his liberty rights in his probationary position as Executive Director of the Waterbury Parking Authority. Nor was any cause of action stated in the claimed political conspiracy to deprive Plaintiff of such position.

Wherefore, the Defendants-Appellees pray that the District Court Judgment be sustained.

DEFENDANTS-APPELLEES

By _____
John F. Phelan

_____
Frank T. Healey, Jr.

CERTIFICATION

I hereby certify that a copy of the foregoing has been sent by U. S. mail, postage prepaid, to Raphael L. Podolsky, Waterbury Legal Aid, 61 Field Street, Waterbury, Connecticut 06702.

Frank T. Healey, Jr.

Frank T. Healey, Jr.